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IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

PACIFIC RENEWABLE ENERGY
SOLUTIONS, INC.,

Plaintiff,

vs.

SEDNA AIRE AMERICAS, LLC, ENERGY
SPECIALTY SOURCE, LLC, ALAN E.
VERHONICH, DAVE R. HEIN, and ROCK
W. HENDERSON,

Defendants.

CIVIL CASE NO. 11-00019

ORDER AND OPINION

This matter is before the court on a Motion to Set Aside Clerk's Default and a Motion to Set Aside Default Judgment filed by Defendants David R. Hein and Rock W. Henderson. Having considered the Parties' arguments and submissions, as well as relevant caselaw and authority, the court hereby **GRANTS** the motions and issues the following opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pacific Renewable Energy Solutions, Inc. (the "Plaintiff") entered into an exclusive distributor agreement with Defendant Sedna Aire Americas, LLC ("Defendant SAA") for air conditioners that were advertised to use significantly less electricity to cool than conventional air conditioners through solar power. Compl. at ¶¶ 4, 12, 13, ECF No. 1. The Plaintiff alleges that

1 it was induced into expending monies in order to create and develop a new business in which
2 Defendant SAA's air condition units would be the primary product. *Id.* at ¶ 14. According to the
3 Plaintiff, it allegedly made several payments by and through its majority shareholder Western
4 Sales Trading Company to Defendant SAA. *Id.* at ¶ 15. The Plaintiff further alleges that it made
5 additional payments to Defendant SAA, but that these payments, however, were delivered to
6 Defendant Energy Specialty Source, LLC ("Defendant ESS") as a beneficiary. *Id.* at ¶ 16.
7 Plaintiff alleges that Defendant SAA delivered defective goods; Defendant SAA's air condition
8 units were not shipped as promised; and the Plaintiff was induced to design a website for the new
9 business venture and hire a marketing consultant. *Id.* at ¶¶ 11, 20, 14. The Plaintiff further
10 alleges that Defendant Alan E. Verhonich ("Defendant Verhonich"), Defendant Rock W.
11 Henderson ("Defendant Henderson") and Defendant Dave R. Hein ("Defendant Hein") are
12 members of Defendant SAA, while Defendants Henderson and Hein are allegedly members of
13 Defendant ESS. *Id.* at ¶¶ 5, 7. The Plaintiff alleges that Defendants SAA and ESS are limited
14 liability companies organized in the state of Florida, and that Defendants Verhonich, Hein and
15 Henderson are residents of Florida. *Id.* at ¶¶ 3, 6, 8-10.

16 On June 14, 2011, the Plaintiff commenced this diversity action. *See* Compl., ECF No. 1.
17 The complaint alleges seven (7) causes of action: (1) breach of contract; (2) breach of express
18 warranty; (3) breach of warranty of merchantability and fitness for a particular purpose ; (4)
19 performance of deceptive trade practices under Guam's Deceptive Trade Practices-Consumer
20 Protection Act; (5) intentional misrepresentation; (6) negligent misrepresentation; and (7) unjust
21 enrichment, or in the alternative, constructive fraud or fraudulent conveyance. *Id.*

22 On July 5, 2011, Defendant Hein was personally served. *See* Summons, ECF No. 8.
23 Defendant Henderson was served on September 28, 2011. *See* Summons, ECF No. 17. Neither
24 Defendants Hein nor Henderson filed a response to the complaint.

1 On August 8, 2011, default was entered against Defendants SAA, Hein and Verhonich.
2 ECF Nos. 11 and 12. On October 5, 2011, default was entered against Defendant ESS, and on
3 October 28, 2011 default was entered against Defendant Henderson. ECF Nos. 18 and 21.

4 On November 1, 2011, the Plaintiff moved for default judgment against all named
5 Defendants. *See* Pl.'s Req., ECF No. 22. On November 29, 2011, default judgment in the
6 amount of One Hundred Eighty-Three Thousand Nine Hundred Forty-Two and 04/100 Dollars
7 (\$183,942.04) was entered against the Defendants. Default J., ECF No. 25.

8 On December 13, 2011, Defendants Hein and Henderson moved pro se to set aside the
9 Clerk's Entry of Default pursuant to Fed. R. Civ. P. Rule 55(c). Defs.' Mot. to Set Aside Clerk's
10 Default, ECF No. 27. In opposition to said motion, the Plaintiff contended that Defendants Hein
11 and Henderson had moved under the incorrect rule because default judgment had already been
12 entered. Pl.'s Notice of Failure to Comply with Federal Rules of Civil Procedure, ECF No. 28.
13 The Plaintiff further argued therein that Defendants Hein and Henderson brought their motion
14 purposefully late in order to delay adjudication of the case. The Plaintiff argued that Defendant
15 Henderson waited seventy-six (76) days after he had been served to take any action through the
16 motion to set aside the entry of default, and that such delay was caused by Defendant Henderson
17 himself who had purposefully evaded service of process. The Plaintiff asserted that Defendants
18 Hein and Henderson acted in bad faith in delaying to answer and that such was further evidence
19 of their fraudulent scheme. Furthermore, the Plaintiff indicated that it feared that the Defendants
20 will use any delay they create to hide and transfer assets in Florida to complete their scheme.
21 Finally, the Plaintiff argued that the moving Defendants have no meritorious defenses to support
22 their motion.

23 On January 30, 2012, Defendants Hein and Henderson moved pro se to set aside the
24 default judgment entered against them, arguing that there is good cause to set aside the default

1 judgment pursuant to Fed. R. Civ. P. Rule 60(b). Defs.' Mot. to Set Aside Default Judgment,
2 ECF No. 30. Therein, Defendants Hein and Henderson claim they have meritorious defenses;
3 the Plaintiff will not suffer prejudice from the requested relief; and they, as the moving
4 Defendants, did not engage in any culpable conduct. The Plaintiff filed its opposition on
5 February 13, 2012, and Defendants Hein and Henderson subsequently filed their reply pro se on
6 March 30, 2012. *See* Pl.'s Opp'n, ECF No. 31, and Defs.' Reply, ECF No. 33.

7 On October 23, 2012, the hearing was held on the instant motions. Defendant Hein
8 informed the court that counsel, Attorney Hamlin, had just been retained and requested the court
9 to continue the hearing. *See* Mins., ECF No. 36. The Plaintiff expressed that it would not object
10 to the continuance if Defendants Hein and Henderson did retain Attorney Hamlin; however, the
11 Plaintiff indicated that it would object if Attorney Hamlin's representation was tentative, because
12 the Plaintiff believed that there had been a pattern of using procedural maneuvers to gain delay.
13 In response, Defendants Hein and Henderson indicated that they had signed an agreement with
14 Attorney Hamlin. The hearing was continued to November 15, 2012. *See* Tr., ECF No. 43.

15 At the hearing held on November 15, 2012, Defendants Hein and Henderson appeared
16 telephonically. Defendant Henderson informed the court that he was unable to access
17 documentation. He further informed the court that they did not have counsel and that they were
18 continuing to proceed pro se. The Plaintiff objected to a continuance of the hearing. The court
19 overruled the Plaintiff's objection and continued the hearing until November 27, 2012 to allow
20 Defendants Hein and Henderson the opportunity to be heard. *See* Mins., ECF No. 42.
21 Defendants Hein and Henderson were ordered to file their documents in support of their motions
22 by November 23, 2012.

23 Defendants Hein and Henderson did not file any documents by November 23, 2012.
24 Consequently, on November 23, 2012, Plaintiff's counsel filed an objection to the moving

1 Defendants' use of any additional documents at the motion hearing based on their failure to file
2 such. *See* ECF No. 44.

3 The hearing on the instant motions was conducted January 24, 2013.

4 **II. ANALYSIS**

5 **A. Legal Standard**

6 A district court may set aside the entry of default upon a showing of good cause pursuant
7 to Fed. R. Civ. P. Rule 55(c). Once a default judgment has been entered, relief must be sought
8 under Fed. R. Civ. P. Rule 60(b). District courts have the discretion to relieve a party from a
9 judgment or order for reason of "mistake, inadvertence, surprise, or excusable neglect" pursuant
10 to Fed. R. Civ. P. Rule 60(b), provided that the party moves for such relief within one year. *TCI*
11 *Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695 (9th Cir. 2001).

12 The application of Rule 60(b) is committed to the discretion of the district court. *TCI*
13 *Group*, 244 F.3d at 695. As a general matter, Rule 60(b) is "remedial in nature and ... must be
14 liberally applied." *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). More specifically, in
15 applying the general terms of Rule 60(b) to default judgments, the Ninth Circuit has emphasized
16 that such judgments are "appropriate only in extreme circumstances; a case should, whenever
17 possible, be decided on the merits." *Falk*, 739 F.2d at 463.

18 Where a defendant seeks relief under Rule 60(b)(1) based upon "excusable neglect," the
19 court applies the same three factors governing the inquiry into "good cause" under Rule 55(c).
20 These factors, which courts consistently refer to as the "*Falk* factors" are: (1) whether culpable
21 conduct of the defendant led to the default; (2) whether the moving party has no meritorious
22 defense; and (3) whether re-opening the default would prejudice the non-moving party. *Falk*, 739
23 F.2d at 463. These factors are disjunctive, and the court is free to deny the motion to vacate a
24 default judgment if any of the three factors is true. *American Ass'n of Naturopathic Physicians v.*

1 *Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000).

2 It is the movant's burden to show the existence of a justification for Rule 60(b) relief.
3 *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988). Because Defendants Hein and
4 Henderson are proceeding pro se, the court construes their pleadings liberally. *Morrison v. Hall*,
5 261 F.3d 896, 899 n.2 (9th Cir. 2001). "The Supreme Court ... has made it clear that pleadings of
6 pro se litigants are to be held to less rigorous standards than those drafted by attorneys." *Cripps*
7 *v. Life Ins. Co. of North America*, 980 F.2d 1261, 1268 (9th Cir. 1992) (citing *Haines v. Kerner*,
8 404 U.S. 519, 520 (1972)). Additionally, the Ninth Circuit has stated that "[its] rules for
9 determining when a default should be set aside are solicitous towards movants, especially those
10 whose actions leading to the default were taken without the benefit of legal representation."
11 *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1089 (9th
12 Cir. 2010). For these reasons, the court construes the movants' motions and submissions
13 liberally in determining whether they have satisfied their evidentiary burdens.

14 **B. Culpable Conduct**

15 The Plaintiff argues that Defendants Hein and Henderson (hereinafter referred to
16 collectively as "Defendants") made an intentional, calculated decision not to respond to the
17 Plaintiff's complaint. The Plaintiff contends that the Defendants have met the requisite Ninth
18 Circuit standard for culpability by not responding when they had knowledge of the complaint.
19 The Plaintiff argues that the Defendants' culpability extends further given its contention that
20 Defendant Henderson evaded service on multiple occasions by setting up appointments for
21 service of process then breaking them, ignoring further communications and evading personal
22 service of process until he was eventually found in Georgia.

23 The Defendants contend that their conduct is excusable rather than culpable. For their
24 part, the Defendants do not deny that they did not file a response in the time allotted for under

1 the rules; rather, they assert they did not do so because they were unable to retain local counsel
2 who did not have a conflict with the Plaintiff's managing director. The Defendants contend that
3 they contacted approximately six (6) to eight (8) attorneys, and, in support thereof, submitted an
4 email from one (1) firm declining representation because of a conflict of interest. *See* Defs.'
5 Reply, Ex. C, ECF No. 33. The Defendants also indicate that they were under the mistaken
6 impression that Defendant Verhonich was responsible for responding to the complaint. In
7 support of this position, the Defendants submitted a draft produced by Defendant Verhonich.
8 *See* Defs.' Reply, Ex. A, ECF No. 33. According to the Defendants, Defendant Verhonich never
9 followed through as was promised. The Defendants further contend Defendant Henderson did
10 not purposefully evade service as Defendant Henderson is a resident of Georgia; Defendant
11 Henderson attempted to see if a power of attorney could be appointed to receive the summons;
12 and Defendant Henderson remained in constant communication with the Sheriff's Department
13 attempting to serve the summons.

14 The Ninth Circuit defines culpable conduct for Rule 60(b) purposes as conduct for which
15 "there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith
16 failure to respond." *TCI Group*, 244 F.3d at 698. As the Ninth Circuit explained:

17 Neglectful failure to answer as to which the defendant offers a
18 credible, good faith explanation negating any intention to take
19 advantage of the opposing party, interfere with judicial
20 decisionmaking, or otherwise manipulate the legal process is not
21 'intentional' under our default cases, and is therefore not *necessarily* –
22 although it certainly may be, once the equitable factors are
23 considered– culpable or inexcusable.

24 *Id.* at 697-698. The Ninth Circuit has only found culpability based simply on the failure to
answer after being provided with notice in some limited circumstances in which the moving
party was "a legally sophisticated entity or individual," and has specifically cautioned against
such a finding when the individual was "not a lawyer" and "was unrepresented at the time of the
default." *Mesle*, 615 F.3d at 1093.

1 Based on the foregoing, the court finds that the conduct of the Defendants was not
2 culpable. The court finds that although the Defendants plainly did not act wisely, their conduct
3 and explanation of the default are neither devious, deliberate, willful nor indicative of a bad faith
4 failure to respond. The Defendants have made an adequate showing that they had no intention to
5 take advantage of the opposing party, interfere with judicial decision making, or otherwise
6 manipulate the legal process.

7 **C. Meritorious Defense**

8 The Ninth Circuit has held that to demonstrate the existence of a meritorious defense, a
9 party must offer up more than mere conclusory assertions but “must present specific facts that
10 would constitute a defense” if the litigation was permitted to proceed. *TCI Group*, 244 F.3d at
11 700 (quoting *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969)). “A mere denial without facts to
12 support it is not enough to justify vacating a default or default judgment.” *Franchise Holding II,*
13 *LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) (quoting *Madsen*,
14 419 F.2d at 6).

15 The Ninth Circuit has noted that the burden on the party moving to vacate a default
16 judgment “is not extraordinarily heavy”; the only requirement is that “a sufficient defense is
17 assertible” and litigation of the claims would not be “a wholly empty exercise.” *TCI Group*, 244
18 F.3d at 700.

19 All that is necessary to satisfy the “meritorious defense” requirement is to allege
20 sufficient facts that, if true, would constitute a defense: “the question whether the
21 factual allegation [i]s true” is not to be determined by the court when it decides
22 the motion to set aside the default. Rather, that question “would be the subject of
23 the later litigation.”
24 *Mesle*, 615 F.3d at 1094 (quoting *TCI Group*, 244 F.3d at 700).

25 In the instant case, the Defendants argue that if given the opportunity to proffer a defense,
26 they will file a 12(b)(1) motion for lack of subject matter jurisdiction, contending that the
27 underlying exclusive distributor agreement, which they submitted as an exhibit, has a binding

1 arbitration clause that is controlling. *See* Defs.’ Mot. to Set Aside Default J., Ex., ECF No. 30.
2 The Defendants also claim that the Plaintiff will have to pierce the corporate veil, which will
3 necessitate the application of Florida caselaw, if they want to sue the Defendants in their
4 personal capacities. Finally, the Defendants contend that they have not intermingled their assets
5 with Defendants SAA and ESS.

6 The Plaintiff contends that it does not matter whether the Defendants intermingled their
7 assets; the Florida legal standard for piercing the corporate veil is irrelevant; and the arbitration
8 clause is unenforceable.

9 The court finds that, without reaching the full merits of the defense relating to lack of
10 subject matter jurisdiction on the basis of the arbitration clause, the Defendants have at least
11 articulated a valid argument. The Defendants assert that the arbitration clause in the contract at
12 issue here precludes this court from deciding any claims. The Plaintiff, however, counters that
13 Guam law precludes the enforcement of binding arbitration agreements in the sale of goods
14 unless certain circumstances occur. Section 32104(c), Title 5 Guam Code Annotated, states the
15 following:

16 An agreement to arbitrate constitutes an important waiver of the right of access to
17 the courts. Therefore, as to any agreement to arbitrate executed after the effective
18 date of this chapter, the agreement to arbitrate any matter arising out of the sale of
19 goods or services for any amount of consideration, or any matter or contingency
20 arising therefrom, shall be treated as a waiver of rights under this chapter, is not
21 binding on any consumer unless there is full compliance both with this section
22 and with this chapter, each party is represented by an attorney, and the agreement
23 to arbitrate is signed by the attorneys representing each of the parties.

24 The ultimate success of the Defendants’ defense is not presently before the court, and so
the court declines to make this determination at this time. At this stage, the issue is simply
whether further litigation “would not be a wholly empty exercise.” *TCI Group*, 244 F.3d at 700.
Based on the foregoing and given the preference to have cases decided on the merits, the court
believes that the Defendants have met their burden of showing a meritorious defense.

1 **D. Prejudice**

2 The final factor to consider is whether vacating the default judgment and permitting the
3 Defendants to answer would prejudice the Plaintiff. “To be prejudicial, the setting aside of a
4 judgment must result in greater harm than simply delaying the resolution of a case. Rather, ‘the
5 standard is whether [plaintiff’s] ability to pursue his claim will be hindered.’” *TCI Group*, 244
6 F.3d at 701. For a delay to be prejudicial, it must “result in tangible harm such as loss of
7 evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.”
8 *Thompson v. American Home Assurance Company*, 95 F.3d 429, 433–34 (9th Cir. 1996). Being
9 forced to litigate on the merits cannot be considered prejudicial because the plaintiff would have
10 had to litigate the merits of the case had there been no default. *TCI Group*, 244 F.3d at 701.

11 The parties dispute whether the Plaintiff would suffer prejudice if the court sets aside the
12 entry of default judgment. The Defendants contend that there exists no conceivable prejudice to
13 the Plaintiff. According to the Defendants, there will be ample opportunity for the Plaintiff to
14 seek discovery upon the re-opening of this case; there is no indication that setting aside the
15 default will provide greater opportunity for fraud or collusion; and the delay in their appearance
16 does not rise to the level of prejudice sufficient to outweigh the strong interest in adjudicating
17 disputes on their merits. Defs.’ Mot., ECF No. 30. The Plaintiff contends that it has hired law
18 firms and process servers to secure service of process in the case and to enforce proceedings in
19 Florida. The Plaintiff further indicates that it is concerned that the Defendants may have
20 conveyed their property to avoid a collection action.

21 The court finds the Plaintiff’s proffered bases for a finding of prejudice unpersuasive.
22 Granting the Defendants’ motions will obviously prejudice the Plaintiff in that the ultimate
23 resolution of the case will be delayed; but, delay alone is insufficient to establish prejudice. In
24 the case at bar, no evidence in the record suggests a real risk that the Plaintiff will not be able to

1 enforce a judgment entered in this case against the Defendants if the default judgment is set
2 aside. Moreover, the Plaintiff's additional basis for a finding of prejudice—that the delay of this
3 action may have permitted the Defendants to hide or fraudulently convey assets—is unsupported.
4 In the absence of any evidence of such conduct on the Defendants' part, the Plaintiff's argument
5 appears speculative. Accordingly, the court finds that the Plaintiff's ability to pursue its claim
6 will not be hindered by setting aside the default judgment.

7 Taking all of the factors in consideration, the court hereby finds that the clerk's entry of
8 default and the default judgment entered against Defendants Hein and Henderson should be set
9 aside. The Defendants have met their burden in demonstrating good cause. First, the
10 Defendants' conduct was not culpable. The Defendants made an adequate showing that they had
11 no intention to take advantage of the opposing party, interfere with judicial decisionmaking or
12 otherwise manipulate the legal process. Second, the Defendants met their burden of showing a
13 meritorious defense. Third, the record does not support the conclusion that the Plaintiff would
14 be unduly prejudiced by granting the Defendants' motion to set aside the default judgment. In
15 addition to the three factors discussed above, the Defendants timely moved to set aside the
16 default judgment. Furthermore, the court gives great weight to the established policies favoring
17 resolution of claims on the merits and disfavoring default judgments, especially when a pro se
18 party is the subject of the default.

19 **III. CONCLUSION**

20 For the reasons set forth above, the court hereby **GRANTS** the Defendants' motions to
21 set aside the clerk's default and default judgment. Specifically, the court orders the following:

- 22 1. The underlying entry of default and default judgment entered against Defendants Hein
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1 and Henderson are hereby vacated;¹ and

- 2 2. Defendants Hein and Henderson are ordered to answer or otherwise respond to the
3 complaint no later than April 30, 2013. Failure to do so may result in the court
4 reinstating the default judgment.

5 **IT IS SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Apr 02, 2013

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23 ¹ Defendants Hein and Henderson requested that their motions also apply to Defendant ESS.
24 Pursuant to General Rule 20.1 of the District Court of Guam, a corporation may not appear pro
se in a case in this court. Accordingly, the court declines to vacate the default judgment as it
relates to Defendant ESS.